No. 89-152

In The

Supreme Court of the United States

October Term, 1989

VERA M. ENGLISH,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center is a project of Northwest Environmental Advocates (NWEA), a non-profit organization formed in 1969. The Center was created in 1988 in response to the need to protect whistleblowers who could not find representation from existing public interest organizations and attorneys. The Center seeks to protect employees who made safety related disclosures at nuclear power facilities from retaliation. Since its inception, the Center has provided assistance to whistleblowers throughout the country including employees at the following nuclear power plants: Palo Verde in Arizona, Nine Mile Point in New York, Plant Vogtle in Georgia, the Savannah River Project in South Carolina, Grand Gulf in Mississippi, Comanche Peak in Texas, and Peach Bottom in Pennsylvania.

The disposition of this case will effect the legal rights of other employee whistleblowers at nuclear power facilities.

Counsel for Petitioner Vera M. English and Respondent General Electric Company have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

I. The Legislative History of Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, indicates that Section 210 was modeled after other laws to which the doctrine of federal pre-emption does not apply.

II. Supreme Court precedent regarding the application of federal pre-emption in employment discrimination cases mandates that Vera English's tort claim not be dismissed due to pre-emption.

III. The District Court in *English* incorrectly found that the state tort of intentional infliction of emotional distress could conflict with Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851.

IV. Section 210 is not primarily a health and safety statute, and the reasoning of the District Court in *Snow v. Bechtel* does not justify pre-emption.

ARGUMENT

I. Congress did not intend Section 210 of the Energy Reorganization Act to pre-empt state tort claims for employment discrimination

In enacting Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, Congress did not intend to pre-empt employees at nuclear power facilities from filing state tort claims (such as intentional infliction of emotional distress) against their employer.

Congress modeled Section 210 after four anti-retaliation employment discrimination laws: the employee protection provisions of the Clean Air Act, 42 U.S.C. 7622; the Federal Water Pollution Control Act, 33 U.S.C. 1367; Mine Health and Safety Act of 1969, 30 U.S.C. 820(b) and the National Labor Management Act [i.e., the Labor Management Relations Act, 29 U.S.C. 185, and the National

Labor Relations Act, 29 U.S.C. 158(a)(4)]. The Senate Report for Section 210 states:

> This amendment is substantially identical to provisions in the Clean Air Act and Federal Water Pollution Control Act. The legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners.

1978 U.S. Code Cong. & Ad. News 7303.

Congress intended that the rights afforded employee whistleblowers who disclose information concerning potential violations of the Atomic Energy Act would be equivalent to the rights afforded employees who disclose information, under, for exampie, the Clean Air Act.

When Congress adopted the Clean Air Act, the Water Pollution Control Act and the Mine Health and Safety Act, they *explicitly* allowed states to enact stronger protections than the federal standard. See, Clean Air Act, 42 U.S.C. 7416, Water Pollution Control Act, 33 U.S.C. 1370 and Mine Health and Safety Act, 30 U.S.C. 955. Similarly, in 1988 this Court declined to judicially pre-empt state retaliatory discharge tort claims under the Labor Management Relations Act. *See*, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

None of the models used by Congress in enacting Section 210 provided for the pre-emption of state wrongful discharge or employment tort law. Congress modeled the statutory provisions of Section 210 on employee protection laws which did not provide for pre-emption of state labor law. Congress did not intend Section 210 to

pre-empt state employment law. Pre-emption is inappropriate in circumstances where Congress did not intend to pre-empt such state action. *Metropolitan Life Ins. Co. v. Massachussetts*, 471 U.S. 724, 747 (1985).

II. Vera English's tort claim is not subject to Federal pre-emption under Supreme Court Precedent

This Court has long recognized that federal and state remedies in employment discrimination or tort actions can mutually co-exist even if the state and federal remedy arises from an identical core of operative facts. *See*, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Atchinson, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). The fact that an employment discrimination claim or state tort claim may arise in the area of atomic energy is not sufficient to depart from the standard rule.

Specifically, the scope of federal pre-emption under the Atomic Energy Act and the Energy Reorganization Act is limited. The U.S. Supreme Court explicated this limitation in its holding in *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190 (1983):

> . . . Congress, in passing the 1954 Act [the Atomic Energy Act] and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspect involved in the construction and operation of a nuclear

> power plant, *but that the states retain their traditional responsibility* in the field of regulating electrical utilities for determining questions of need, reliability, cost, *and other related state concerns*.

461 U.S. at 205 (emphasis added).

Traditional "state concerns" were not subject to federal pre-emption.[1] In *Pacific Gas & Electric*, the Court held that states could regulate the economic issues of atomic energy – even though such regulation could have an effect on the safety of nuclear plant operations.

The *Silkwood* case is consistent with *Pacific Gas & Electric*. *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1985). Overlap between federal safety regulation and state tort liability can exist (in *Silkwood*, the NRC had jurisdiction to review and fine the utility for the very infraction which laid the basis for the state tort suit). The Court recognized that utilities may be open to both civil fines for safety infractions leveled by the NRC *and* punitive damages under traditional state tort laws. The mere fact that such overlap could exist was not grounds for finding pre-emption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) ("Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.").

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[1] Unquestionably, labor relations is an area of traditional state concern. *See*, e.g. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 412 (1988) ("the establishment of labor standards falls within the traditional police powers of the State.").

III. No conflict exists between Section 210 and state tort claims

In the proceedings below, the District Court found pre-emption, reasoning that there was an "irreconcilable conflict between the federal and state standards" concerning employee relations at commercial nuclear facilities and that this conflict would "frustrate the objectives of federal law." Appendix to petition for writ of certiorari pp. 19a. In making these findings the lower court misapplied the law on federal pre-emption.

The District Court reviewed the language of Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, and articulated hypothetical circumstances in which Section 210 and state law may conflict. Nothing on the record supported a finding, at the summary judgment stage, that such conflicts actually existed. Instead, based on the hypothetical possibility that conflicts may possibly exist between the state and federal law the lower court found pre-emption. This was an error of law.

In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court articulated the standard for applying the hypothetical reasoning to pre-emption cases:

> To defeat Granite Rock's [Granite Rock Co. alleged that the actions of the California Coastal Commission were pre-empted] facial challenge, the Coastal Commission *needed merely to identify a possible set of permit conditions not in conflict with federal law."*

480 U.S. at 573 (emphasis added).

In *California Coastal Commission*, this Court did not find pre-emption based on hypothetical circumstances. To the contrary, the state was given the right to "identify a possible" set of "conditions *not* in conflict with federal law." *California Coastal Commission*, supra, 480 U.S. at 593.

When the alleged "conflicts" between Section 210 and state tort law are scrutinized, it is clear that no conflict sufficient to justify pre-emption actually exists. The District Court erred when it attempted to use subsection (g) of Section 210, 42 U.S.C. 5851(g), as proof that Section 210 and state tort remedies "conflict." Likewise, the District Court erred when it found that the 30 day statute of limitations under Section 210 created a conflict with state tort remedies.

Subsection (g) of Section 210 states that relief is not available where an employee "acting without direction from his or her employer, deliberately causes a violation of this chapter . . . " But, there is no support for the proposition that state wrongful discharge or tort law could result in the reinstatement of an employee who in fact was guilty of a true subsection (g) violation. No federal pre-emption exists where, as here, the common law does not, in fact, conflict with federal law. A federal court cannot simply manufacture state law and then find that this manufactured law demonstrates federal pre-emption exists. Moreover, the lower court simply ignored the case precedent under both federal and state law that allows an employer to discharge an employee for *valid* reasons – even if the discharge was caused, in part, for retaliatory reasons. *See, Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).

Essentially, subsection (g) merely codifies the landmark *Mt. Healthy* Supreme Court decision. Under *Mt. Healthy*, even if an employee can make out a prima facie case (i.e., a violation of subsection (a) of Section 210), the employee still loses if the employer successfully articulates a legitimate nondiscriminatory reason for the discharge. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287. Employee conduct violative of subsection (g) would constitute a legitimate nondiscriminatory reason for the discharge. The *Mt. Healthy* analysis has been uniformly followed by state and federal courts. *See e.g., NLRB v. Transportation Management*, 462 U.S. 393, 403 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, (1981); *Belts v. Stroehmann Bros.*, 415 A.2d 1280, 1281 (Pa. Super. 1986); *Eckstein v. Kuhn*, 408 N.W. 2d 131 (Mich. App. 1987); *McClurg v. Marion Co.*, 360 S.E. 2d 221 (W.Va. 1987). For example, in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 927-28 (1981), a California court, applying state wrongful discharge law, warned that "care must be taken . . . not to interfere with the legitimate exercise of managerial discretion . . . " It is only reasonable to interpret state tort suits under North Carolina law consistent with other federal and state courts which have uniformly followed *Mt. Healthy* and its progeny.

The "timeliness" issue raised by the District Court is another red herring. The lower court hypothesized that one of the reasons Section 210 had expedited time limitations was to ensure prompt resolution of *safety problems*. However, the District Court failed to distinguish between a complaint filed before the U.S. Department of Labor

(DOL) and a complaint filed with the U.S. Nuclear Regulatory Commission (NRC). Specifically, a Section 210 complaint does not need to allege any safety violation by an employer. *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Also see, Kohn, *Protecting Environmental and Nuclear Whistleblowers*, p. 29 (Nuclear Information Resource Service, Wash., D.C. 1985), quoting *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, slip op. of Department of Labor Administrative Law Judge, p. 3 (5/11/83), adopted by Secretary of Labor (9/9/83). The complaint need not contain any evidence that an NRC regulation was violated, and at trial the veracity of any safety allegation is never an issue. It is well settled that whether an employer in fact violated any NRC regulations is irrelevant in a Section 210 proceeding, and the DOL has no jurisdiction over these matters. *See* Kohn, *Protecting Environmental and Nuclear Whistleblowers*, at pp. 28-30 (Nuclear Information and Resource Service, Wash., D.C. 1985). Filing a complaint with the DOL under Section 210 will not, in and of itself, lead to any investigation or resolution of the underlying employee allegations. Section 210 did not, directly or indirectly, cede any of the NRC's jurisdiction over nuclear safety to the DOL. Although the DOL may share information with the NRC, a proceeding under Section 210 is not an NRC proceeding.

Nothing in Section 210 establishes any statute of limitations for an employee to file a *safety* complaint with the NRC. Section 210 does not require an employee to alert the NRC within 30 days of identifying a potential safety violation, and often retaliatory discharge occurs months or years after the reported safety disclosure. *See*, Part IV of this Brief, Infra.

A 30 day statute of limitations is not an aspect of the law which has facilitated the exposure of health and safety problems to the NRC. In a thorough report by the U.S. Administrative Conference, the 30-day statute of limitations was criticized as "unreasonable" and the unfortunate fact that numerous cases are dismissed by the DOL (both at the investigatory and the adjudicatory stages) due to failure to comply with the statute of limitations was documented. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers: A Report to the Administrative Conference of the United States," reprinted at 134 *Cong. Record* 1451, 1454 (February 23, 1988). Likewise, the U.S. Department of Labor has recognized the unfortunate hardship often caused employees by the 30 day statute of limitation:

> "The 30 day time limitation for filing claims is short and may result in significant numbers of well-founded claims not being investigated. Moreover, it may thwart the purpose of the ERA by diminishing the protection of employees . . . "

Cox v. Radiology Consulting Associates, Inc., 86-ERA-17, Recommend Decision and Order of Department of Labor Administrative Law Judge (8/22/86), adopted by the Secretary of Labor (11/6/86).

Allowing employees to file employment discrimination claims under state law after the 30 day statute of limitations under Section 210 has expired will facilitate the Congressional purpose of Section 210.

IV. District Court Case *"Snow v. Bechtel"* does not provide additional grounds for justifying pre-emption

The lower court in *English* correctly found that "employee protection" was the "paramount" purpose behind

Section 210 of the ERA. This holding differed from a decision by the U.S. District Court for the Central District of California, *Snow v. Bechtel Const. Inc.*, 647 F.Supp. 1514 (C.D. Cal. 1986), which held that Section 210 pre-empted state wrongful discharge law because "nuclear safety" regulation is "pre-empted by the federal regulatory subpoena." *Id.*, 647 F.Supp. at 1517.

The lower court correctly refused to follow the reasoning of *Snow*. The *Snow* court ignored the statute's legislative history and the rulings of the U.S. Secretary of Labor in reaching its decision. The legislative history of Section 210 states that it was modeled directly after similar employee protection laws found in the Clean Air Act (CAA) and the Federal Water Pollution Act (FWPC). 1978 U.S. Code Cong. & Ad. News 7303. Significantly, the legislative history of Section 210's models explicitly did *not* require that the whistleblower's information be health or safety significant. The laws were designed to protect the workers' right to express concerns – even if those concerns were found to have no relevance to safety. In relevant part the legislative history of the Clean Air Act's employee protection provision stated: "Moreover, as in the Safe Drinking Water Act and the Federal Water Pollution Act, the employer would not have to be proven to be in violation of the Clean Air Act requirement in order for this section to protect the employee's action." 1977 U.S. Code Cong. & Ad. News 1405.

Section 210 has been interpreted as not requiring that any of the employee's allegations be proven or even "unique" in their revelations. *Deford v. Secretary of Labor*, 700 F.2d 281, 286, (6th Cir. 1983), accord, *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). The Secretary of Labor

has repeatedly held that the legitimacy of the employee safety allegations is legally irrelevant, and that the U.S. Department of Labor has no jurisdiction to decide safety issues. According to one such Department of Labor ruling:

> "However, it is clear that this office does not have jurisdiction to decide any issues relative to the quality of the construction work in question. Those questions are within the province of other federal regulatory agencies. Therefore, any references to quality in this Decision and Order are not to be construed in any manner as finding in that regard."

Landers v. Commonwealth-Lord Joint Venture, 83-ERA-5, *slip op.* of ALJ at 3 (5/11/83), adopted by Secretary of Labor (Sept. 9, 1983); *stay denied, Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67 (7th Cir. 1983).

The veracity of an employee's safety concerns are irrelevant in a Section 210 case. *See*, Kohn, *Protecting Environmental and Nuclear Whistleblowers*, pp. 28-30. Section 210 is an employee protection statute.

CONCLUSION

For the above-mentioned reasons, this Court should find that Section 210 of the Energy Reorganization Act does not pre-empt employees who work at nuclear facilities the right to proceed under state law with a tort claim for intentional infliction of emotional distress.

Respectfully submitted,

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